No. 87-571

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

Supreme Court, U.S.
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In re: Coordinated Pretrial Proceedings In Petroleum Products Antitrust Litigation, M.D.L. 150

CITY OF LONG BEACH AND
STATE OF CALIFORNIA,
Plaintiffs-Petitioners,
VS.
EXXON CORPORATION,
MOBIL OIL CORPORATION,
SHELL OIL COMPANY,
CHEVRON CORPORATION,
(FORMERLY STANDARD OIL COMPANY OF CALIFORNIA),
TEXACO INC., and
UNION OIL COMPANY OF CALIFORNIA,
Defendants-Respondents.

ON PETITION FOR WRITS OF CERTIORARI, MANDAMUS AND PROHIBITION TO THE TEMPORARY EMERGENCY COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether this Court should review a decision of the Temporary Emergency Court of Appeals ("TECA") that the Ninth Circuit has exclusive appellate jurisdiction over an antitrust causation issue decided by the district court, when TECA's decision was correct and when an intervening decision by the district court causes the causation issue no longer to be presented on the facts.

2. Whether this Court should review TECA's decision not to decide two other issues collateral to the causation issue, when that decision was correct because the intervening district court decision also caused those issues no longer to be involved in a real or substantial controversy, and when those issues can become so involved only if the Ninth Circuit were both to reverse the district court's intervening decision and to affirm the causation decision.

PARTIES TO THE PROCEEDING

A listing of parent companies, subsidiaries and affiliates of the Respondents is printed in Appendix E, which due to its length is separately bound.

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ON PETITION FOR WRITS OF CERTIORARI, MANDAMUS AND PROHIBITION TO THE TEMPORARY EMERGENCY COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writs of certiorari, mandamus and prohibition (the "Petition"), seeking review of the Temporary Emergency Court of Appeals ("TECA") opinion in this

case. That opinion is printed at Appendix A to the Petition.

STATEMENT OF THE CASE

Petitioners seek to justify this Court's premature and unnecessary intervention in this litigation by pointing to an alleged "impasse" between TECA and the Ninth Circuit over which court has appellate jurisdiction of the district court's causation decision. Petitioners further contend that this impasse places them in "an appellate jurisdictional quagmire from which they cannot escape" without this Court's intervention. (Petition, at 3.) In fact, neither the impasse nor the quagmire exists. Both are creations of Petitioners' mischaracterization of the proceedings in the appellate courts and of the issues actually decided by the district court and presented for appeal.

Respondents submit this Statement to demonstrate that there is no impasse over jurisdiction in the courts of appeal. Rather, the Ninth Circuit's stay of Petitioners' appeal expired as a result of the TECA decision, and the Circuit Court's review of issues before it, which include the causation issue, can dispose of Petitioners' antitrust claims without the need for this Court to decide the purported Questions Presented by the Petition or for TECA ever to decide any issues. This Statement also shows that any confusion over appellate jurisdiction that previously existed was of Petitioners' own making.

Proceedings In The District Court

Petitioners sell crude oil (referred to as "net profits oil") to Respondents pursuant to long-term contracts. Petitioners commenced this litigation in 1975, alleging that since at least the early 1960's Respondents had conspired to depress the prices posted for California crude oil, including Petitioners' crude oil, in violation of

sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2). Petitioners sought treble damages pursuant to section 4 of the Clayton Act (15 U.S.C. § 15) on the general theory that "but for" the alleged conspiracy they would have received higher prices for their crude oil. For the period when Petitioners received the maximum prices permitted by federal price control regulations (from August 15, 1971 through October 1, 1976), Petitioners claimed that those ceiling prices would have been higher because federal price controls would have locked in the "but for" prices as the ceiling prices. They sought damages equal to three times the gap between these hypothetical higher ceiling prices and the actual ceiling prices they received. Petitioners also sought damages for breach of contract.

In July 1984, the district court entered partial summary judgment (the "Price Control Decision") dismissing Petitioners' antitrust damage claims from April 12, 1972 through October 1, 1976 and thereafter to the end of the damage period to the extent based upon "but for" ceiling prices higher than the actual ceiling prices. (Petition, at B-9.) The district court made three separate decisions in granting that summary judgment. Most fundamentally, it held that governmental decisions to maintain price ceilings based upon the existing California posted prices as a matter of law "supplanted the conspiracy as the effective reason for the level of the controlled prices," thereby precluding Petitioners' damage claims from satisfying the causation requirements of section 4 of the Clayton Act (the "Causation Decision").[1] (Petition,

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[1]Contrary to Petitioners' suggestion (Petition, at 8 & n.5), the district court did not hold that the price control statutes or regulations had "suspended or abolished" the antitrust laws or vested the price control agencies with "exclusive jurisdiction" over Petitioners' claims. Indeed, the district court in 1978 had denied defendants'

at B-7.) The district court also made two decisions permitting it to apply this basic causation ruling to the period prior to October 25, 1973, when Petitioners contended that price ceilings did not apply to their crude oil. First, the district court rejected Petitioners' claim that they were totally exempt from price controls prior to that date (the "Exemption Decision"). Second, it rejected Petitioners' claim that Phase III price controls were not legally binding regulations (the "Phase III Decision").[2]

At the time of the Price Control Decision, the district court assumed *arguendo* that Petitioners could prove that the posted prices upon which the ceiling prices were based were set by conspiracy. The Price Control Decision stated that "[f]or purposes of this decision, it is assumed, without in any manner deciding, that the prices for net profits oil received by Long Beach during the thirty-day period ending August 14, 1971 were set pursuant to conspiracy among the defendants." (Petition, at B-6.)

The district court next granted a further partial summary judgment (the "Entitlements Decision") on the ground that another federal regulatory program — the entitlements program — was the superseding cause of Petitioners' injury after November 1, 1974. The Entitlements Decision resulted in the outright dismissal of the remaining post-October 1976 antitrust claims and provided an alternative basis for dismissal of the post-November 1974 antitrust claims previously dismissed by the Price Control Decision (*i.e.*, those claims based upon

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motion for partial summary judgment based upon exclusive jurisdiction and its 1984 summary judgment accepted the earlier decision as correct.

[2]The Petition apparently uses "Price Control issue" (as well as "Neeb issue") to refer to the Causation Issue. Except for a passing reference in one footnote (*id.* at 8 n.6), the Petition does not mention the Exemption or Phase III Issues.

the gap between the "but for" ceiling prices and the actual ceiling prices).

Finally, in September 1985, the district court granted summary judgment (the "Merits Decision") dismissing Petitioners' antitrust claims in their entirety. This decision rested upon two alternative grounds, each of which is inconsistent with the assumption underlying the Price Control Decision that the pre-price control posted prices were set by defendants' conspiracy. The district court found that those prices were attributable not to conspiracy, but to yet a third federal regulatory program — the Mandatory Oil Import Program. As an alternative holding, it found that "[a]fter more than eight years of discovery, the plaintiffs simply do not have the evidence to prove the antitrust conspiracy that they allege." The district court entered final judgments pursuant to Fed. R. Civ. P. 54(b) dismissing Petitioners' antitrust claims. Petitioners' contract claims, although limited as to time period by other summary judgments, remain pending in the district court.

Proceedings In The Courts of Appeal

On December 24, 1984, Petitioners commenced the appellate process by filing in the Ninth Circuit and TECA identical petitions for interlocutory appeal of the Price Control and Entitlements Decisions. Petitioners' identical cover letters to each court (App. A hereto is Petitioners' letter to the Ninth Circuit) correctly stated that two of the three issues identified for appeal — the Causation Issue and the Entitlements Issue — were within the Ninth Circuit's exclusive jurisdiction. The Ninth Circuit responded first, denying the petitions without prejudice pending renewal "in the event that the [TECA] rules that

it lacks subject matter jurisdiction."[3] (Petition, at D-1.) On April 18, 1985, TECA decided to accept an interlocutory appeal of the Price Control Decision, apparently (but not clearly) limited to the Exemption and Phase III Issues, and to decline the appeal from the Entitlements Decision on the ground that TECA "does not have jurisdiction over damage issues in antitrust actions." 761 F.2d 710, 712 (Temp. Emer. Ct. App. 1985). TECA's Opinion did not discuss the Causation Issue.

Petitioners then filed a motion requesting that TECA also review the Causation Issue. Petitioners' reversal of position was based upon their newly made contention that the district court actually had decided an exclusive jurisdiction issue, within TECA's jurisdiction, and not an antitrust causation issue, within the Ninth Circuit's jurisdiction. In May 1985, TECA provisionally agreed to hear the Causation Issue, reserving decision on its jurisdiction until after briefing and argument. Petitioners' reversal of position, which led TECA provisionally to accept the issue for review, engendered the confusion on the jurisdictional issue that persisted until TECA's recent ruling that the Ninth Circuit had jurisdiction over the Causation Issue. As discussed at pp. 11-12 *infra*, TECA correctly recognized in that ruling that the question presented was an antitrust causation issue within the Ninth Circuit's jurisdiction, as Petitioners had initially contended.

Having convinced TECA to proceed with an interlocutory appeal of all issues decided by the Price Control Decision, Petitioners renewed their petition in the Ninth

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[3]The Petition's statement (*id.* at 9 & n.7) that the Ninth Circuit there "agreed" that all the issues decided by the Price Control Decision were within TECA's jurisdiction misstates this Order. The Petition omits (without indicating the omission) the statement that the Order was without prejudice and should be renewed if TECA determined that it lacked jurisdiction.

Circuit for interlocutory review of the Entitlements Decision. Before the Ninth Circuit could act on the renewed petition, the district court's Merits Decision resulted in final judgment dismissing the antitrust claims. The Merits Decision caused the Ninth Circuit to refuse to accept interlocutory appeal at a time when final appeal was imminent. Similarly, the Merits Decision caused TECA to dismiss the interlocutory appeal it had accepted, because it no longer satisfied the requirements for such appeal. 788 F.2d 1571, 1574 (Temp. Emer. Ct. App. 1986).

After the entry of final judgment on the antitrust claims, Petitioners filed new appeals to both courts. They continued the confusion by again asserting that TECA had jurisdiction over the Causation Issue. They caused TECA, over Respondents' objection, again to reserve decision on jurisdiction until after briefing and argument. And Petitioners, by arguing to the Ninth Circuit that TECA had jurisdiction over the Causation Issue, caused it to stay all briefing in that court "until TECA decides whether it has jurisdiction over the price ceiling issue," (Petition, at E-1)[4] even though all parties agreed that the Ninth Circuit had jurisdiction over the other issues decided by the district court. The Ninth Circuit noted that TECA then had not yet determined whether it had jurisdiction over that issue and correctly reasoned that "[a] decision by TECA on whether it has jurisdiction over the

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[4]The Petition mischaracterizes the Ninth Circuit's stay as effective "pending TECA's decision of the Price Control Issue" (*id.* at Question Presented 1) and "pending a decision by TECA of those issues within TECA's exclusive jurisdiction" (*id.* at 4). If either of these statements were accurate, the Ninth Circuit stay would remain effective, giving some basis for the alleged "impasse." However, the stay actually ran to the time when "TECA decide[d] whether it ha[d] *jurisdiction over* the" Causation Issue. *Id.* at E-1 (emphasis added). Since TECA has made that decision, the stay is no longer effective.

price ceiling issue will determine whether the issue should be briefed in the Ninth Circuit." (Petition, at E-1.) By later order (Petition, at F-1), the Ninth Circuit continued the stay for an additional three months or until TECA "decides whether it has jurisdiction over the price ceiling issue." That order requested that the Petitioners file a status report within 7 days of the expiration of the stay.

On August 18, 1987, TECA issued its Opinion dismissing the appeals and, more importantly, ruling that the Causation Issue "is within the exclusive appellate jurisdiction of the Ninth Circuit." (Petition, at A-6.) TECA made that ruling after extensive briefing and argument and aware that the Ninth Circuit had stayed its proceedings until TECA decided the jurisdictional issue.[5] TECA's ruling, as Petitioners' Status Report recognized (App. B hereto), caused the Ninth Circuit stay to expire by its terms. The parties' status reports (Apps. B and C hereto) requested the Ninth Circuit to proceed to hear and, if necessary, decide all issues within its jurisdiction, including the Causation Issue.[6] The status reports also asked the Ninth Circuit to rule on motions concerning the lengths of briefs and to set a briefing schedule so that the

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[5]Petitioners' contention that TECA's ruling on the jurisdictional issue is only a suggestion, not a holding, (Petition, at 12) is disingenuous at best. The parties fully briefed, argued and presented the jurisdictional issue for decision by TECA. TECA knew that its decision of that issue was important, even if it did not decide any issues on the merits, because the Ninth Circuit was awaiting its decision on jurisdiction. And, the parties requested TECA to decide the jurisdictional issue.

[6]Petitioners later filed a further status report (App. D hereto) informing the Ninth Circuit of their intention to file the Petition in this Court and suggesting that the Ninth Circuit should proceed on the causation issue only "[i]n the event the Supreme Court denies plaintiffs' petition for writ of certiorari or grants the petition but does not rule that TECA must decide the 'Neeb' issue."

Circuit Court could proceed finally to resolve those appeals.

REASONS FOR DENYING THE WRIT

The Petition asks this Court to reverse the two decisions that TECA made: (1) that TECA's limited issue jurisdiction does not extend to the Causation Issue and (2) that TECA should not review any of the issues decided by the Price Control Decision because the Merits Decision removed its assumed predicate of an antecedent conspiracy.

Neither of these decisions merits this Court's consideration for several compelling reasons. First, both decisions are correct: TECA refused to overreach to assume jurisdiction over an antitrust issue not within its limited grant of jurisdiction. And, it properly exercised judicial restraint in not deciding issues within its jurisdiction that may never be significant. Second, neither of the questions decided by TECA is important outside of this litigation. Third, even if the Petition presented important and recurring questions — which it does not — this Court should not undertake to review these questions when appeals concerning issues to which they relate are pending before the Ninth Circuit.

None of Petitioners' reasons for premature review by this Court withstands scrutiny. Appellate review is not at an impasse, but is progressing through the Ninth Circuit toward this Court in the normal fashion. This is not a proper case for certiorari, much less one of the extraordinary writs. Accordingly, this Court should deny the Petition.

I.

TECA Correctly Decided That The Causation Issue Is Within The Ninth Circuit's Jurisdiction

Early in TECA's existence, TECA and the Circuit Courts settled the contours of TECA's jurisdiction by limiting TECA review to issues that arise under the federal price control statutes (Economic Stabilization Act of 1970 ("ESA") and Emergency Petroleum Allocation Act of 1973 ("EPAA")) or their implementing regulations. *See, e.g., Coastal States Marketing, Inc. v. New England Petroleum Corp.*, 604 F.2d 179, 185 (2d Cir. 1979); *City of Groton v. Federal Power Commission*, 487 F.2d 927, 936 (Temp. Emer. Ct. App. 1973). This Court also recognized that Congress vested TECA with jurisdiction over such issues, but no others, in order to assure uniform and expert interpretation of the substantive provisions of the price control statutes and regulations. *Bray v. United States*, 423 U.S. 73, 75 (1975).

TECA has jurisdiction only where the district court actually decided an ESA or EPAA issue. *Texaco Inc. v. Department of Energy*, 616 F.2d 1193, 1198 (Temp. Emer. Ct. App. 1979) ("For purposes of determining TECA jurisdiction, what is determinative is not whether an EPAA question exists but whether an EPAA question has been adjudicated"). Because TECA has "issue," and not "case," jurisdiction, its appellate jurisdiction is

> "not an either-or proposition with regard to the case as a whole. Rather the Court takes jurisdiction over those issues which it has authority to decide, refusing to hear any others, although they are all part of the same case or controversy."

Texaco Inc. v. Department of Energy, 616 F.2d at 1197.[7] Accordingly, TECA must "dissect the issues actually before [it] to see whether the decision in the district court involved the adjudication of an EPAA issue." *RJG Cab, Inc. v. Hodel*, 797 F.2d 111, 117 (3d Cir. 1986).

An ESA or EPAA issue, within TECA's jurisdiction, is one requiring either the construction, or a determination of the validity, of the ESA or the EPAA or their regulations, as is clear even from the opinions cited in the Petition. *See, e.g., United States v. Wyatt*, 680 F.2d 1080, 1086 (5th Cir. 1982) (TECA had jurisdiction over a constitutional challenge to the validity of EPAA regulations and an interpretation of the contested terms of those regulations, which the court described as "classic 'EPAA issues' "). The Petition correctly states that a determination of the preemptive effect of the price control statutes which involves construction of those statutes raises an ESA or EPAA issue. *See, e.g., Mobil Oil Corp. v. Tully*, 639 F.2d 912, 915 (2d Cir.), *cert. denied*, 452 U.S. 967 (1981) (preemption issue required "construing and interpreting the EPAA and its regulations"). However, that principle is inapplicable here because, as TECA ultimately concluded, the Price Control Decision did not involve a preemption or exclusive jurisdiction decision. TECA correctly decided that the issue actually adjudicated was an "antitrust damages issue under Section 4 of the Clayton Act," because it involved analysis of "the proper causation standard required of appellants to prove their claims of antitrust injury and antitrust damages." (Petition, at A-13.) The district court did not decide, as

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[7]TECA construes its jurisdiction mindful that " 'courts of special jurisdiction should strictly construe their statutory grants of jurisdiction.' " *Texaco Inc. v. Department of Energy*, 616 F.2d at 1197 (quoting *United States v. Cooper*, 482 F.2d 1393, 1398 (Temp. Emer. Ct. App. 1973)).

the Petition contends (*id.* at 9, 12), that price control officials had either the authority, or the intent, to preempt the antitrust laws. The actions of price control officials simply provided the factual background to which the district court applied principles of antitrust causation. In so doing, the district court construed section 4 of the Clayton Act, and not the price control statutes or their regulations.

The Petition's Appendices confirm the correctness of TECA's analysis of the Price Control Decision. The Decision shows that it is based upon the principle that a plaintiff is not injured within the meaning of section 4 of the Clayton Act where government action prevents him "from asserting against the defendants a 'legal right' cognizable under the antitrust laws," and it cites the antitrust causation holdings in three opinions. (Petition, at B-8.) The district court's Conclusions of Law (Petition, at C-25-26; *see* nos. 5, 6 and 7) also clearly show that it made an antitrust causation ruling interpreting section 4 of the Clayton Act, and did not interpret the ESA, the EPAA or their regulations.

None of the opinions cited in the Petition supports extending TECA's jurisdiction to the Causation Issue simply because price controls were involved. Opinions such as *Quincy Oil, Inc. v. Federal Energy Administration*, 620 F.2d 890, 893 (Temp. Emer. Ct. App. 1980), simply recognize TECA's jurisdiction to decide "subsidiary, procedural and threshold questions such as standing, ripeness and venue" in order that it may perform "the normal and necessary functions of any appellate court." That principle does not extend TECA jurisdiction to important and substantive issues, such as the antitrust Causation Issue.

Rather, the settled principles of TECA's issue jurisdiction discussed above establish that the issue is not within

TECA's jurisdiction. There is no reason for this Court at this late date in TECA's existence to disturb any of those principles. (*See* p. 16 *infra.*) Moreover, in light of the district court's intervening Merits Decision that there was no evidence of a conspiracy in the first place, the issue whether such conspiracy was the proximate cause of the alleged injury is no longer presented. (*See* pp. 13-14 *infra.*) This Court should not undertake review where the issue is hypothetical.

In addition to providing a reason why this Court should not review the jurisdictional issue, the correctness of TECA's decision demonstrates that there is no appellate "quagmire." Thus, there is no reason to believe that the Ninth Circuit will reach a conclusion different than TECA if it ever needs to reach the issue. Certainly, the Ninth Circuit's January 1985 decision to defer the jurisdictional issue for TECA's determination in the first instance does not indicate that it will disagree with the determination TECA made the only time it ever considered the merits of the jurisdictional issue.

II.

TECA Correctly Determined Not To Decide The Issues Within Its Jurisdiction

Having decided that the Causation Issue was not within its jurisdiction, TECA needed to decide whether it nonetheless should proceed to decide the Exemption and Phase III Issues, which are within its jurisdiction. TECA determined not to proceed on those issues, finding that they "are not now involved in a real and substantial controversy." (Petition, at A-14.) TECA's determination is clearly correct for three distinct reasons.

The first is that the Merits Decision rendered the Price Control Decision — including the decisions on the Causa-

tion, Exemption and Phase III Issues — moot by destroying its assumed predicate of an antecedent conspiracy. (*See* p. 4 *supra.*) The district court's finding that there was no antecedent conspiracy has final preclusive effect, which is not destroyed by the pendency of its appeal to the Ninth Circuit. *See, e.g., Hunt v. Liberty Lobby, Inc.*, 707 F.2d 1493, 1497-98 (D.C. Cir. 1983). Since TECA had no jurisdiction to review that finding, TECA had to take it as having extinguished the antitrust claims to which the collateral Price Control Decision issues pertained. The Petition's argument that those issues are not moot simply because "a mooting event may later occur" and all of the cases cited in the Petition (*id.* at 13-14) are inapposite. The mooting event here (the Merits Decision) already has occurred. The issues are no less moot because a subsequent event (a Ninth Circuit reversal) may render them not moot in the future.

The second reason is judicial economy and efficiency. TECA may never need to review the Exemption or Phase III Decisions. Only if the Ninth Circuit (or this Court reviewing the Ninth Circuit) were to reverse both alternative holdings of the Merits Decision would such review be necessary to resolve Petitioners' antitrust claims. Thus, the Petition (*id.* at 14) concedes that the Merits Decision provides a "sufficient basis" for dismissal of Petitioners' antitrust claims. In these circumstances it would have been wasteful of judicial resources for TECA to have decided the issues and even more wasteful for this Court now to decide to compel TECA to decide them.

The third reason is that the Exemption and Phase III issues, which are the only issues within TECA's jurisdiction, are wholly collateral to, and dependent upon, the Causation Decision. Even if the Ninth Circuit were to reverse the Merits Decision, those issues may become significant only if the Ninth Circuit also were to affirm the

Causation Issue. In such circumstances, TECA should stay its hand until the Ninth Circuit's action makes it clear that a decision by TECA will be significant. *See Coastal States Marketing, Inc. v. New England Petroleum Corp.*, 604 F.2d at 187 n.10 (decision whether TECA or the Circuit Court should stay its hand depends upon the circumstances of each case).

The Petition argues that TECA's determination not to decide those issues must be incorrect because the Ninth Circuit also could decide "to do nothing" if it "were to apply TECA's reasoning." (*Id.* at 14.) This argument is incorrect, because the appeals to both courts are quite different and the Ninth Circuit could not, by following TECA's reasoning, decide to do nothing. The Merits Decision does not depend upon any assumed predicate that has been removed by a later decision of the district court. Accordingly, it is not moot in the same sense that the Price Control Decision was rendered moot by the Merits Decision. Moreover, Petitioners' contention that the Ninth Circuit could refuse to review the Entitlement Decision because the Price Control Decision renders it "surplusage" is based upon an outright distortion of that decision. The Petition contends that the Price Control Decision "cuts off damages from April 12, 1972 through the end of the damage period." (Petition, at 14-15.) The Price Control Decision, however, cuts off damages only through October 1, 1976. Thereafter, it dismissed only a portion of those damages such that the Entitlements Decision (or the Merits Decision) is necessary to dismiss the remainder of those damages. Finally, Petitioners' argument that the Ninth Circuit could do nothing totally ignores TECA's decision that the Causation Decision is within the Ninth Circuit's jurisdiction.

III.

Neither Of The Questions Presented Is Important Outside Of This Litigation

Both issues decided by TECA not only are not *now* important in this litigation, but also *never* will be important outside of this litigation. TECA and the Circuit Courts (with this Court's guidance in the *Bray* opinion, *supra*) largely settled the contours of TECA's issue jurisdiction during the period when TECA was more active. The issue is now relatively unimportant because economy-wide price controls expired 14 years ago and oil industry price controls expired almost 7 years ago. As a result, there remain pending very few cases presenting EPA or ESAA issues.[8] Moreover, even if issues involving TECA jurisdiction were generally important, the issue upon which TECA's decision turned in this case still would not be important. That very narrow issue depended entirely upon the determination whether the Price Control Decision adjudicated an antitrust causation or an exclusive jurisdiction issue, not upon the decision of any issue of jurisdictional law. Thus, the parties do not dispute that the former issue is for the Ninth Circuit and that the latter issue would be for TECA.

The Petition's analogy to the jurisdiction of the Federal Circuit, and citation to *Christianson v. Colt Industries Operating Corp.*, 822 F.2d 1544 (Fed. Cir. 1987), does not support review of the TECA jurisdiction issue presented here. Congress granted "*case,* not *issue,* jurisdiction" to the Federal Circuit. 822 F.2d at 1552 n.9. Therefore, a decision explaining the contours of TECA issue jurisdic-

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[8]When he introduced legislation in May 1987 to abolish TECA, Senator Hatch indicated that only 21 cases remained pending before TECA. 133 Cong. Rec. S6099 (daily ed. May 6, 1987).

tion will not be useful in delimiting the contours of the Federal Circuit's case jurisdiction.

Similarly, the mootness issue is limited, at most, to a very small number of cases. It can exist only where Congress has vested appellate jurisdiction in two courts over different issues in the same case. Only in such a case can one appellate court be precluded from reaching an issue because it is bound by a lower court decision in the same case which it cannot review. Since TECA, with its declining case load, is the only federal appellate court with issue jurisdiction, this Court would serve little purpose by providing guidance on this question.

IV.

Mandamus Or Prohibition Is Not Appropriate

Petitioners' purported description of the Petition as also seeking mandamus or prohibition (referred to herein collectively as "mandamus") provides no reason for this Court to intervene where review by certiorari is inappropriate for all of the reasons discussed above. Moreover, Petitioners have failed to comply with either the substantive or procedural requirements for mandamus.

Supreme Court Rule 26 creates a heavy burden for mandamus: "It must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be had in any other form or from any other court." " 'The general principle which governs proceedings by *mandamus* is, that whatever can be done without the employment of that extraordinary writ, *may not be done with it.* It lies only when there is practically *no other remedy.*' " *Helstoski v. Meanor,* 442 U.S. 500, 505 (1979) (quoting *Ex parte Rowland,* 104 U.S. 604, 617 (1882)).

Petitioners have failed to show either that exceptional circumstances are present or that adequate relief cannot be had in another form or court. Their only attempt to justify the issuance of an extraordinary writ is their insistence that only with the help of this Court can they escape from the "appellate jurisdictional quagmire" in which they are "trapped." (Petition, at 3; *see also* 11.) But, as demonstrated at pp. 8-9 *supra*, this "jurisdictional quagmire" does not exist because the Ninth Circuit stay expired by its terms once TECA decided the jurisdictional issue.

Petitioners similarly have failed to demonstrate the absence of other adequate relief. Certainly review of the TECA opinion by writ of certiorari under 28 U.S.C. § 1254(1) is a potential remedy, as Petitioners acknowledge by petitioning for such a writ themselves. Accordingly, this Court should not issue a writ of mandamus if it finds that certiorari is not merited.[9] The Ninth Circuit also could grant Petitioners adequate relief. If the Ninth Circuit were to reverse the Merits Decision and the Causation Decision, Petitioners' antitrust claims would be fully reinstated, leaving no decisions for TECA on the antitrust claims. Alternatively, if the Ninth Circuit affi

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[9]This Court has consistently reviewed a Circuit Court's dismissal or other disposition of a case for lack of jurisdiction by writ of certiorari, not by extraordinary writ. *See, e.g., United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 230-31 (1958) (Second Circuit dismissed appeal as untimely); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 485-86 (1983) (Second Circuit dismissed appeal for lack of subject-matter jurisdiction); *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972) (Ninth Circuit vacated injunction on grounds that petitioners lacked standing); *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 121 (1974) (Third Circuit dismissed case for mootness); *Zahn v. International Paper Co.*, 414 U.S. 291, 292 (1973) (Second Circuit affirmed District Court's refusal to certify a class on jurisdictional amount-in-controversy grounds).

rms the Merits Decision, Petitioners' antitrust claims remain dismissed, but again there also are no decisions left for TECA on those issues. In these circumstances, this Court should not issue an extraordinary writ compelling TECA to act before the Ninth Circuit.

This Court also should reject the Petition for mandamus on procedural grounds. Petitioners failed to comply with Supreme Court Rule 27.2(a), which requires that a petition seeking a writ of mandamus "identify by names and office or function all persons against whom relief is sought * * *." The Petition does not name the TECA panel. Moreover, Supreme Court Rule 27.2(b) provides that "[t]he petition shall be served on the judge or judges to whom the writ is sought to be directed * * *." Petitioners also failed to serve the TECA panel. (*See* Petition, Proof of Service By Mail.)

CONCLUSION

For the reasons stated above, the Petition for writs of certiorari, mandamus and prohibition should be denied.

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APPENDIX A

LETTERHEAD

December 24, 1984

Honorable Phillip B. Winberry
Clerk of the United States Court of Appeals
for the Ninth Circuit
P.O. Box 547
San Francisco, California 94101

Dear Mr. Winberry:

Enclosed for filing are an original and three copies each of two Petitions for permission to appeal two orders, certified for interlocutory appeal on December 17, 1984, by the United States District Court for the Central District of California. We have bound these two petitions together for the Court's convenience, because the background of the action and the reasons necessitating immediate appeal are common; however, the respective issues on which appeal is sought are entirely distinct.

These Petitions are also being filed with the United States Temporary Emergency Court of Appeals, in light of various decisions, including *Coastal States Marketing, Inc. v. New England Petroleum Corporation,* 604 F.2d 179, 187, n.10 (2d Cir. 1979), which noted that different issues treated in a lower court's decision are to be appealed to

different courts of appeals where the exclusive jurisdiction of the Temporary Emergency Court of Appeals may be involved.

We believe that the antitrust damage issues stated in Question 1 of the Petition entitled "Petition . . . to Appeal Decision on Federal Price Ceilings," appearing at page 2 thereof, are subjects within the normal jurisdiction of the Circuit Courts of Appeals. Which court has jurisdiction over the exemption issue defined in Question 2, also at page 2 of that Petition, is not so clear, and that issue may well be a matter for this Court to decide. The issues treated in the Petition entitled "Petition . . . to Appeal Decision on Federal Entitlements Program" are matters that we believe are within the jurisdiction of the Ninth Circuit.

In compliance with the local rules of the Ninth Circuit Court of Appeals, I hereby request twelve sets of application materials for admission to practice before federal courts in the Ninth Circuit on behalf of those attorneys of record for plaintiffs who are not already admitted.

Thank you for your cooperation.

Yours truly,

KIMBA M. WOOD

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket Nos. 86-5859
86-5860

IN RE:
COORDINATED PRETRIAL PROCEEDINGS IN
PETROLEUM PRODUCTS ANTITRUST
LITIGATION

CITY OF LONG BEACH, et al.,
Plaintiffs-Appellants,

VS.

STANDARD OIL COMPANY OF CALIFORNIA, et al.,
Defendants-Appellees.

Appeal From A Judgment By The
United States District Court For The
Central District of California

PLAINTIFFS' STATUS REPORT PURSUANT TO ORDER OF AUGUST 24, 1987

[Names and addresses of counsel omitted.]

I
PLAINTIFFS' STATUS REPORT PURSUANT TO ORDER OF AUGUST 24, 1987

On October 29, 1986 this Court entered an Order (Judges Goodwin and Alarcon) staying briefing in these

cases on appeal until the Temporary Emergency Court of Appeals of the United States (TECA) decides whether it has jurisdiction over the price ceiling issue, or for a period of six months, whichever occurs first. A copy of the Order is attached as Exhibit 1. The Order further provided that upon expiration of the stay the parties were to file status reports and, if appropriate, supplemental briefs in support of their motions to establish a briefing schedule. The six months stay ended without a decision by TECA.

On May 8, 1987 plaintiffs filed a Status Report Pursuant to Order of October 29, 1986 in which they reported that oral argument had taken place before TECA on February 13, 1987 but that no decision had been rendered within the six months stay period. Plaintiffs also reported that on April 23, 1987, plaintiffs had filed a motion addressed to Chief Judge James R. Browning for the appointment of a three judge panel to preside over all phases of these consolidated appeals including prebriefing issues. On June 30, 1987 that motion was denied (Judges Pregerson and Alarcon).

On August 18, 1987, TECA rendered its decision, dismissing plaintiffs' appeals "on the basis that they failed to satisfy the jurisdictional requirements provided by Section 211(b)(2) of the ESA, incorporated in 15 U.S.C. Sec. 754(a)(1)." Three opinions were filed, a plurality opinion by Judge Wesley E. Brown, a concurring opinion by Judge William H. Becker and a dissenting opinion by Judge Homer Thornberry. A copy of the three opinions is attached hereto, marked Exhibit 2.

On August 24, 1987, the Court (Judges Goodwin and Alarcon) entered an order that these appeals are further stayed for three months from the entry of the order or until TECA decides whether it has jurisdiction over the

price ceiling issue, whichever occurs first. The Order further provided that within seven days of the expiration of the stay, plaintiffs shall file a status report. A copy of that order is attached hereto, marked Exhibit 3. Since TECA dismissed plaintiffs' appeals before entry of the latest stay order that stay has expired and plaintiffs, therefore, have promptly filed this status report.

II
REQUESTED COURSE OF ACTION

It is appropriate that this Court now rule on the parties' respective motions for oversized briefs, for extensions of time for filing briefs and for determination of the issues to be briefed. The appeals before this court have been on file for approximately sixteen months and a briefing schedule has not yet been set. The jurisdictional questions which have arisen between this Circuit and TECA unfortunately have disrupted the orderly progress of these appeals. With the recent ruling by TECA, plaintiffs believe that there is no good reason for further delay in these important actions. Therefore, plaintiffs respectfully request this Court to rule on the pending motions and to set a definitive briefing schedule so that this twelve year old case will not be further delayed.

Respectfully submitted,

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[Proof of service and exhibits omitted.]

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 86-5859
86-5860

IN RE:
COORDINATED PRETRIAL PROCEEDINGS IN
PETROLEUM PRODUCTS ANTITRUST
LITIGATION

CITY OF LONG BEACH, et al.,
Plaintiffs-Appellants,

v.

STANDARD OIL COMPANY OF CALIFORNIA, et al.,
Defendants-Appellees.

Appeal from a Judgment by the
United States District Court for the
Central District of California

RESPONSE OF DEFENDANTS-APPELLEES TO PLAINTIFFS' STATUS REPORT PURSUANT TO ORDER OF AUGUST 24, 1987

[Names and addresses of counsel omitted.]

I.

PRELIMINARY

This Court has before it separate motions by plaintiffs-appellants[1] and defendants-appellees[2] for the filing of oversized briefs and for an extension of the time in which to file briefs. In addition, plaintiffs have asked this Court to order that the antitrust causation issue arising out of the District Court's July 19, 1984, federal price ceilings summary judgment decision not be briefed (Plfs.' Motion at 9-18) or, in the alternative, that plaintiffs be permitted to satisfy their briefing requirements on that issue by merely submitting to this Court their briefs filed in TECA which address, *inter alia,* the causation issue.[3] While, judging from Plaintiffs' Status Report Pursuant To Order Of August 24, 1987 ("Plaintiffs' Status Report"), neither the TECA ruling, the passage of time nor the appeals filed within the last few weeks in this and a related matter, has modified any of plaintiffs' previously taken positions, the same is not true as to defendants. Rather, defendants urge that the Court consider the following factors in ruling on the pending motions.

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[1]Plaintiffs' Motion And Memorandum For Oversized Briefs, For Extension Of Time For Filing Briefs And Re Issues To Be Briefed, dated August 4, 1986 ("Plfs.' Motion").

[2]Motion Of Appellees For Leave To File Oversized Briefs And To Set A Briefing Schedule, dated August 6, 1986 ("Defs.' Motion").

[3]Appellants' Reply Memorandum To Appellees' Motion For Oversized Briefs, For Extension Of Time For Filing Briefs And Re Issues To Be Briefed, dated August 25, 1986, at 3.

II.

REQUEST FOR PERMISSION TO FILE OVERSIZED BRIEFS.

At the time defendants moved for permission to file oversized briefs they asked, in recognition of the complexity of this matter and out of an abundance of caution, that their page limit entitlement be doubled from the 50 pages each is entitled to under the rules to 100 pages per defendant. (Defs.' Motion at 10-23.) Plaintiffs also sought a doubling of their page limit entitlement to 100 pages. (Plfs.' Motion at 2-9.) Since that time, defendants have had an opportunity to re-assess their requirements and have concluded that while this complex case justifies oversized briefs, each can adequately address the issues before this Court in substantially fewer pages than originally requested. Therefore, defendants hereby amend their motion and ask that each defendant be allowed 60 pages, *i.e.,* the 50 pages each is allowed by the rules, plus 10 additional pages in recognition of the complexity of this matter. Defendants continue to request that they be permitted to allocate these pages as they deem appropriate between individual defendant briefs and a joint brief, thereby affording them the flexibility to put as much as possible into a joint brief and, in the process, limiting the length of the individual briefs.

In making this request, defendants remain mindful of the admonition of this Court's Rule 28-4 that, to the greatest extent practicable, all parties on a side join in a single brief. In view of the fact, however, that each defendant extensively briefed its individual summary judgment motion in the District Court, it is a virtual certainty that each will want the opportunity to submit a separate brief in this Court. How the requested pages will actually be allocated between the joint and individual

briefs, however, must necessarily await review of plaintiffs' opening brief.

III.

TIME FOR FILING OF BRIEFS.

Defendants continue to believe, for the reasons set forth in Defs.' Motion at 24, that they will need 120 days from the filing of plaintiffs' opening brief to prepare and file responses.

With respect to plaintiffs' time for the filing of a reply brief, however, while defendants did not object to allowing 60 days for that purpose at the time they were seeking permission to file 600 pages of responsive briefs, with the significant reduction in the number of pages now being requested by defendants, we now believe it inappropriate to allow plaintiffs 60 days to file a reply brief. We suggest that 45 days is more than sufficient for that purpose.

IV.

ISSUES TO BE BRIEFED.

In view of the ruling by TECA, attached as Exhibit 2 to Plaintiffs' Status Report, plaintiffs' request that they not be required to brief the antitrust causation issue raised by the District Court's price ceiling ruling has been rendered moot. TECA has expressly ruled that this issue is "within the exclusive appellate jurisdiction of the Ninth Circuit." Slip Opinion at 12. As such, it must either be briefed or abandoned in this Court.

As respects plaintiffs' alternative request, that in lieu of including argument on this issue in their briefs filed in this Court they simply be allowed to submit their TECA

briefs to this Court, defendants continue to believe, for the reasons set forth in the Response Of Appellees To Appellants' Reply Memorandum Filed August 25, 1986, dated August 26, 1986, that such an approach can only lead to confusion, prejudice to defendants and a waste of judicial resources.

V.

THE NEW "CONTRACT" APPEALS.

Plaintiffs' Status Report makes no mention of the fact that there are now two more appeals before this Court involving these same parties, one of which arises out of the same District Court action from which this appeal has been taken. (*See* Exhibits A and B hereto.) The appeal arising from this very action, Ninth Circuit Docket No. 87 6301, is from a Rule 54(b) final judgment entered by Judge Gray in favor of defendants on plaintiffs' "good faith" posting contract claim. (A copy of that judgment is annexed as Exhibit C.) The second, related, appeal, Ninth Circuit Docket No. 87 6300, is in *People of the State of California, et al. v. Chevron Corporation, et al.,* District Court No. CV-86-1771-WPG. That appeal is also from a Rule 54(b) final judgment entered by Judge Gray on contract claims in a later time period but virtually identical to those previously disposed of in Ninth Circuit Docket No. 87 6301. (A copy of that judgment is annexed as Exhibit D. The basis for the judgment in No. 87 6300 is that that action is an improper attempt to re-litigate matters previously adjudicated in No. 87 6301.)

While defendants feel obligated to bring these appeals to the Motion Panel's attention, it is not their wish that the appeals in this matter be further delayed by consolidating them with either or both of the new appeals. While defendants further believe that, in the interest of judicial

economy, it will be desirable, at the appropriate time, to consolidate the two new contract appeals, no such request is being made at this time.

VI.

CONCLUSION.

Defendants respectfully urge that the Court take the changed circumstances set forth herein into consideration in ruling on the presently pending motions for leave to file oversized briefs, extensions of time and limitation of issues to be briefed.

DATED: September 4, 1987.

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Union Oil Company of California

[Proof of service and exhibits omitted.]

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket Nos. 86-5859
86-5860

IN RE:
COORDINATED PRETRIAL PROCEEDINGS IN
PETROLEUM PRODUCTS ANTITRUST
LITIGATION

CITY OF LONG BEACH, et al.,
Plaintiffs-Appellants,
v.
STANDARD OIL COMPANY OF CALIFORNIA, et al.,
Defendants-Appellees.

Appeal From A Judgment By The
United States District Court For the
Central District of California

PLAINTIFFS' FURTHER STATUS REPORT PURSUANT TO ORDER OF AUGUST 24, 1987 AND REPLY TO RESPONSE OF DEFENDANTS TO PLAINTIFFS' STATUS REPORT DATED AUGUST 25, 1987

Plaintiffs' Further Status Report

Since filing their status report dated August 25, 1987, plaintiffs have decided to petition the Supreme Court for a writ of certiorari with respect to the decision of the Temporary Emergency Court of Appeals dismissing plaintiffs' appeals which were pending in that Court. Attached hereto, marked Exhibit 1, is a copy of a letter dated September 9, 1987 from the Clerk of the Supreme Court and an ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI to October 1, 1987.

On September 11, 1987, the United States Bankruptcy Court for the Southern District of New York entered a stipulated order on the motion of plaintiff, the City of Long Beach, for relief from the automatic stay of the bankruptcy code to permit plaintiffs to pursue their litigation against Texaco Inc. Pursuant to that order, paragraph 1, plaintiffs are now free to prosecute these consolidated appeals with respect to defendant Texaco. A true and complete copy of the stipulation and order is attached hereto, marked Exhibit 2.

Reply to Response of Defendants To Plaintiffs' Status Report Dated August 25, 1987

In the event the Supreme Court denies plaintiffs' petition for writ of certiorari or grants the petition but does not rule that TECA must decide the "Neeb" issue, in the interests of economy, this Court should permit that issue to be briefed in this Court by submitting the briefs already on file before TECA. Great sums of money have already been spent by the parties in thoroughly briefing that issue, and nothing of substance could be added to what has already been written on the Neeb issue. Plaintiffs fear that the 100 pages they have requested for their

principal briefs will prove inadequate if they must also brief the Neeb issue along with the antitrust issues, the Entitlements issue and the Mandatory Oil Import Program issue. Defendants failed to explain why plaintiffs' request if granted would "lead to confusion, prejudice to defendants and a waste of judicial resources". Response at 4.

Plaintiffs object to defendant's suggestion that in view of their reduced page requests it would be "inappropriate to allow plaintiffs 60 days to file a reply brief". Response at 3. Defendants suggest that plaintiffs should be given only 45 days to answer their 300 pages while defendants are to have 120 days to answer plaintiffs' 100 pages. No explanation is offered as to how defendants will be prejudiced if plaintiffs have the 15 extra days in these already 16 month old appeals.

Respectfully submitted,

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[Proof of service and exhibits omitted.]

PROOF OF SERVICE BY MAIL

The undersigned declares:

I am, and was at all times herein mentioned, a citizen of the United States, a resident of the County of Los Angeles, over the age of 18 years and not a party to this action or proceeding. My business address is 1706 Maple Avenue, Los Angeles, California 90015.

On November 2, 1987, I served the foregoing RESPONDENTS' BRIEF IN OPPOSITION on the parties in this action by mailing true copies thereof to counsel for the parties, addressed as follows:

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425 Park Avenue
New York, New York 10022

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Los Angeles, California, this 2nd day of November 1987.

Ce Ce Medina

CE CE MEDINA